No. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,* vs. THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*	No. 23

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners respectfully move for leave to file a brief as *amici curiae* in this case. The consent of the attorneys for the appellees has been obtained and is on file with the Clerk. The consent of the attorneys for the appellants was requested but refused. Under Rule 42(4) of this Court's Rules dealing with the right of representatives of the public to file briefs as *amicus curiae* without consent, the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners may be entitled to file their brief without consent. However, since the brief submitted does not come within the literal language of this Rule, this motion for leave is filed in order to put our right to file the brief beyond any question.

The interest of the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners in this case arises from the fact that they are parties to a case presently pending in the United States District Court for the Eastern District of Louisiana

which involves a number of issues relating to the lawfulness of the Commission's determination of relative cost of service similar to issues that were presented in this case to the district court in Los Angeles. Although the Los Angeles court did not reach these cost issues, the appellants in their brief have urged this Court to abandon its normal practice of not reviewing an administrative record in the first instance, to pass upon the cost issues, and to uphold the Commission's orders. Such a ruling might prejudice issues in the pending case in New Orleans to which we are party. Hence, the attached brief as *amici curiae* is submitted to make certain that the Court is aware of the full ramifications of the course of action suggested by the Government and to urge the Court not to follow that course.

We understand that the appellees in this case are submitting briefs opposing the Government's suggestion that the Court pass on the issues reserved by the Los Angeles court. However, their opposition necessarily will be restricted to the impact of the Government's suggestion in this case. We think it important that the Court have before it some concrete idea of what might be involved in such a course of action so far as other cases are concerned. And we think this is particularly important in view of certain representations made to the New Orleans court in our case by Government counsel which are directly contrary to the position that they take here.

Respectfully submitted,

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April 5, 1967

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BRIEF FOR THE SOUTHERN GOVERNORS' CONFERENCE AND THE SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICI CURIAE.

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INDEX

	PAGE
Question Presented	1
Statement	1
Argument: The Court should adhere to its normal practice of not reviewing an administrative record in the first instance	5
Conclusion	12
Appendix A	13

CITATIONS

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706	4, 6, 7
Aetna Casualty Co. v. Flowers, 330 U.S. 464 (1947)	9
Government of Guam v. FMC, 365 F.2d 515 (D.C. Cir. 1966)	8
Mississippi River Fuel Corp. v. FPC, 163 F.2d 433 (D.C. Cir. 1947)	8
New York v. United States, 331 U.S. 284 (1947)	11
Official-Southern Divisions, 325 I.C.C. 1, 325 I.C.C. 449 (1965), action for review pending, Aberdeen & Rockfish R. Co. v. United States (E.D. La., No. 15454)	2, 3, 4, 5, 6, 7, 10, 11
Seaboard Air Line R. Co. v. United States, 382 U.S. 154 (1965)	9, 10
United States v. Ballard, 322 U.S. 78 (1944)	9
United States v. Great Northern R. Co., 343 U.S. 562 (1952)	9, 10
Universal Camera Corp. v. Labor Board, 340 U.S. 474 (1951)	10

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QUESTION PRESENTED

Whether this Court should adhere to its settled practice of not reviewing an administrative record in the first instance, where many of the issues urged which would involve such review are pending in another case of vital importance to a whole section of the country, and where the Court would have to pass upon the issues without the benefit of adequate briefs or even a printed record.

STATEMENT

This case involves an appeal from a judgment of the United States District Court for the Southern District

of California, dated February 17, 1965, setting aside the orders of the Interstate Commerce Commission in its Docket No. 31503, the so-called *Transcontinental Divisions* case. A related appeal from the same judgment by certain railroads is also pending before this Court (*Chicago and North Western Ry. Co.* v. *The Atchison, Topeka and Santa Fe Ry. Co.*, No. 8, October Term 1966), but the question which concerns the *amici curiae* was not raised by the appellants in that case.[1]

The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners did not participate in the *Transcontinental Divisions* case, either during the Commission's proceedings or in the district court. However, as representatives of the interests of the people of the South, we did participate in a similar proceeding, I.C.C. Docket No. 29885, involving the division of joint rates between the Southern railroads and the railroads serving the Northeast part of the United States, which is known as the *Official-Southern Divisions* case.

The *Official-Southern* case was decided by the Commission after the *Transcontinental* case and on an entirely different basis (325 I.C.C. 1; 325 I.C.C. 449). In the *Official-Southern* case, unlike the *Transcontinental* case, no effort was made to pattern the prescribed divisions on "the broader aspects of revenue need" (R. 1032). Instead, the Commission expressly based its order wholly upon its findings with respect to cost of service (325 I.C.C. at 37, 49), and prescribed divisional scales directly related to these costs (325 I.C.C. at 82). However, the

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[1] The appellants in the *Chicago and North Western* appeal expressly recognize "the usual practice of this Court not to review an administrative record in the first instance" (Brief for Appellants Chicago and North Western Railway Company, et al., in No. 8, p. 50, note 39), and they nowhere suggest that this practice be abandoned in this case.

Commission's cost findings in the *Official-Southern* case reflect the very same approach that it used in the *Transcontinental* case. There, as here, although the asserted basis of its action was "the relative costs of the parties reflecting their respective operations as to this traffic" (325 I.C.C. at 50; see also 325 I.C.C. at 26, 56), the Commission relied almost exclusively upon the average costs of handling all traffic in these territories in reaching its conclusions. And there, as here, virtually every objection to reliance upon such territorial averages was brushed aside without either findings or evidence to support such action.

Consequently, many of the same issues that were raised before the district court here as to the lawfulness of the Commission's approach to the determination of cost of service in a divisions case and as to the sufficiency of its findings under the evidence of record are presently pending in an action brought by the Southern railroads, and joined by the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners as intervening plaintiffs, in the United States District Court for the Eastern District of Louisiana: *Aberdeen and Rockfish R. Co.* v. *United States*, No. 15454.[2] The *Aberdeen and Rockfish* case was argued on December 12, 1966, before a three-judge panel consisting of Circuit Judge Wisdom and District Judges Hunter and West, and it is currently under consideration pending decision by that court.

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[2] The full text of the issues presented by the plaintiffs in the *Aberdeen and Rockfish* case is reprinted as Appendix A to this brief from Paragraph 5 of the pretrial order entered there. A review of Appendix A makes it plain that many of the issues raised before the New Orleans court are virtually identical to the issues raised in these cases. Compare issues No. 1-15 of Appendix A with issues No. 21-29 in the List of Issues Remaining in Controversy submitted here (R. 1339-1345). The Government expressly recognized the similarity of the cost issues reserved by the Los Angeles court and those in the *Aberdeen and Rockfish* case in its brief before the New Orleans court (p. 14).

The opinion of the Los Angeles district court under review in these cases did not reach the cost issues (R. 1733). Hence, that opinion is of no direct concern to the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners, for the issues upon which the Los Angeles court set aside the Commission's *Transcontinental* orders are not involved in the *Aberdeen and Rockfish* case. We agree with the Los Angeles court that the requirements of the Administrative Procedure Act (5 U.S.C. §§ 551-559, 701-706) apply to divisions cases, but the question of whether or not those requirements were met by the Commission in dealing with the revenue needs contentions in the *Transcontinental* case is one as to which we have no interest. However, the Government has asked this Court to go beyond the issues decided by the district court and to hold that the Commission's entire orders in the *Transcontinental* case should be reinstated (Brief for the United States and the Interstate Commerce Commission, pp. 61-62), and that procedure would directly affect the *Official-Southern* case. Accordingly, this Brief is submitted by the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners as *amici curiae* to urge the Court to follow its normal practice and restrict its decision in these cases to the issues decided by the district court.

ARGUMENT

I. THE COURT SHOULD ADHERE TO ITS NORMAL PRACTICE OF NOT REVIEWING AN ADMINISTRATIVE RECORD IN THE FIRST INSTANCE.

Although the Government urges the Court to go beyond reversing the district court's judgment by reinstating the Commission's orders, the main thrust of its argument does not actually ask the Court to pass upon the cost issues reserved by the district court. Instead, the Government seems to suggest that the Court can simply ignore the cost issues, apparently on the theory that they are inherently frivolous, for the Government does not discuss the particular issues which were presented to the district court, nor did it bother to have portions of the record printed which are necessary for the Court actually to consider the merits of those issues.[3] Not a single case is cited by the Government to support this approach, which seems to be based upon the bare assertion that the district court, while expressly reserving decision on the cost issues raised, actually "effectively disposed of all issues which it thought merited its consideration" (Brief for the United States and the Interstate Commerce Commission, p. 62). We think it plain that the district court did no such thing, and this Court certainly should not itself attempt to review the record in this case in the first instance to resolve the merits

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[3] Nor, for that matter, did the Government bother to raise the cost questions in its Jurisdictional Statement, as is expressly conceded in its brief in the *Aberdeen and Rockfish* case before the New Orleans district court (p. 14):

> ". . . the Transcontinental Divisions order was set aside on other grounds without apparently reaching the cost issues . . . and, probable jurisdiction was noted without those cost questions being raised. . . ."

This fact alone would seem to preclude the position taken by the Government here for Rule 15(1)(c)(1) of this Court's Rules expressly provides: "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."

of the cost issues which the district court reserved.

The cost issues presented in this case, like those presented in the *Official-Southern* case, largely arise under the explicit requirements of the Administrative Procedure Act (5 U.S.C. §§ 551-559, 701-706). A basic issue presented in each case, which pervades the Commission's entire treatment of the matter of cost of service, is whether the requirement of Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 556(d)) permits the Commission to decide a case against a defendant on the ground that his position must be rejected for lack of comparable evidence, when the only comparable evidence in existence is in the sole possession of the plaintiff. Further issues presented in each case challenge the sufficiency of the Commission's findings on specific cost issues under Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c)), and the substantiality of the evidence on the record as a whole to support the Commission's cost findings under Section 10(e) of the Act (5 U.S.C. § 706).

This, of course, is not an appropriate time to brief the merits of the cost issues, even as they arise in these cases, much less in the context of the record in the *Official-Southern* case. However, in assessing the general nature of those issues, the Court can and should take into account the utterly absurd conclusions which the Commission's reliance upon territorial average costs produces. For example, in the *Official-Southern* case, the Commission's averages impute costs 58 percent higher to the Northern railroads than to the Southern railroads for border interchange service even though that service is frequently performed by jointly owned switching companies which charge each railroad equally. And the Commission's averages impute car costs to the Northern railroads 32 percent higher than to the Southern railroads, even though Official-Southern traffic moves in the same car in both territories and no differences in trans-

portation conditions were shown that would justify any higher Northern car costs on Official-Southern traffic.

In the *Aberdeen and Rockfish* case, the plaintiffs have raised specific issues as to the lawfulness under the Administrative Procedure Act of these and other cost conclusions reached by the Commission and used in prescribing new Official-Southern divisions. We do not suggest that the mere raising of such issues requires that an administrative order be set aside. But we think it plain that any court to which such issues are properly presented has a duty to decide them on their merits in the light of the record in the particular case before it.

The Government's contention that the district court which heard this case would not have decided these issues is based upon quotations from the court's opinion that are taken wholly out of context. As we read that opinion, it indicates precisely the contrary, for the district court made it plain that the requirements of the Administrative Procedure Act would be enforced in connection with an administrative determination of cost of service (R. 1722):

> "There is no question but that whether the new divisions are just, reasonable and equitable is for the Commission, not for the Court. But it is equally clear that, in prescribing the divisions, the minimum duty of the Commission is to give due consideration to each of the five factors the Congress has listed in Section 15(6). Furthermore, although the Commission has broad discretion in the matters involved, such discretion can never serve as a substitute for the 'findings and conclusions, as well as the reasons or basis therefor,' required by Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 1007(b)], or for the clarity of findings required by that Act."

This, of course, is no more than the law requires of courts expressly charged by Congress with the responsibility for review of administrative action under the

Administrative Procedure Act. Certainly, the fact that an administrative agency has discretion and expertise in the formulation and use of cost finding techniques does not insulate its decisions in that area from judicial review. In *Mississippi River Fuel Corp.* v. *FPC*, 163 F.2d 433 (D.C. Cir. 1947), the court, speaking through Judge Prettyman, expressly rejected the contention that cost determinations are invulnerable to review as an exercise of discretion, saying (163 F.2d at 439):

> "The discretion which must be exercised is that of the Commission. Congress has confided that function to it. At the same time, Congress has forbidden arbitrary action and has imposed upon the courts a duty of review in that respect. Arbitrary action, if it means anything, means action not based on facts or reason. The discretion and judgment confided in the Commission must be exercised upon facts and for reason. The duty of review imposed upon the courts requires that the facts be found and the reasons stated. Otherwise, the courts cannot determine whether a given action is or is not arbitrary.
>
> "The Congressional provisions extend to complicated, difficult matters as well as to simple questions. The courts cannot evade their responsibility merely because the subject matter is obscure. And neither can they be required to probe the minds of the agency for unfound facts or unexpressed reasons. The coordination of the two functions of administrative discretion and judicial review requires that the facts upon which the discretion is exercised, and the reasons, be clearly and completely stated. When the matter is complicated, the necessity is greater."

See also *Government of Guam* v. *Federal Maritime Commission*, 365 F.2d 515 (D.C. Cir. 1966).

The Government does not bother to distinguish, or even to mention the *Mississippi River Fuel* case, although the district court quoted from it in this case with approval (R. 1721-1722). Nor does the Government cite a single case to support its suggestion that this Court should

ignore legal issues with respect to an administrative determination of cost of service without passing on the merits of those issues. The fact that this case has been in litigation for a long time (see Brief for the United States and the Interstate Commerce Commission, p. 62), although regrettable, does not justify the Government's position. It would seem clear to us that the parties to this case are entitled to a review of the Commission's cost determinations on the basis of its findings and the evidence of record in this case, however long that may take. But whatever the parties to this case may or may not be entitled to, it would certainly seem clear beyond the peradventure of a doubt that the right of the parties in the *Official-Southern* case to review on the basis of the Commission's findings there and the evidence of record in that case cannot be prejudiced because of delay in this case.

The Government's further suggestion that the Court "proceed to resolve the entire controversy once and for all (Brief of the United States and the Interstate Commerce Commission, p. 62), although somewhat less extreme, is equally unsound. This Court has long followed a policy of not passing, in the first instance, upon issues not reached by the court whose decision is under review. See, *e.g.*, *United States* v. *Ballard*, 322 U.S. 78, 88 (1944); *Aetna Casualty Co.* v. *Flowers*, 330 U.S. 464, 468 (1947). This policy applies with special force to issues involving the review of an administrative record, for such issues inevitably involve a complicated factual situation as to which the views of a lower court are certain to be helpful. *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952); *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 157 (1965). Moreover, this Court has recognized that Congress has placed the primary responsibility for review of administrative orders in the lower courts and has stated that "This Court will inter-

vene only in what ought to be the rare instance when the standard [of review] appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491 (1951).

In suggesting that the Court pass upon the cost issues not reached by the district court in this case, the Government simply ignores this established policy, without any explanation as to why it should not be applicable here. If anything, it would seem to us that the present case is a much stronger one than either the *Great Northern* case or the *Seaboard Air Line* case for application of the policy against reviewing an administrative record in the first instance, for adherence to that policy here would assure that the Court not only would have an opportunity to benefit from the views of the district court which heard this case, but it could obtain the views of the New Orleans district court, which heard the *Official-Southern* case on many of the same issues. As things now stand, the Court is without the benefit of the views of either of the district courts, as well as those of the parties for that matter, for the merits of the cost issues have not even been briefed.[4]

We cannot avoid entirely the suspicion that the Government's effort to get around the Court's usual policy in this case reflects a desire somehow to obtain approval of the Commission's wholly unjustified approach to cost of service issues in divisions cases without close judicial scrutiny. In the New Orleans court, where we opposed this approach vigorously, counsel for the Government assured the court that the cost issues to be decided there were not involved in this case (Transcript of oral argument before the United States District Court for the Eastern District of Louisiana, December 12, 1966, p. 118):

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[4] If for any reason, the Court is inclined to accept the Government's suggestion to resolve the cost issues, we urgently request that the Court set dates for supplemental briefs on those issues and permit us to participate in the argument on such issues as *amici curiae*.

"THE COURT (Judge Wisdom):

Is that case [the *Transcontinental* case] analogous to this case?

"MR. CERRA:

Your Honor, there are no cost issues in that case before the Supreme Court . . . .

"THE COURT (Judge Wisdom):

I was wondering whether it was worth waiting for the Supreme Court?

"MR. CERRA:

I don't see any reason why this court would have to wait for the Supreme Court, because I think that the issues here are quite different from what is before the Supreme Court, your Honor. There — and I don't want to get into a dissertation about what the District Court did, but they are different from what issues are presented to this Court today by this hearing."

Now, in a case in which we are not even a party, the same counsel urges the Court to render a decision which would affect a substantial number of the issues in the *Official-Southern* case.

Whatever the Government's explanation for this highly questionable strategy may be, we strongly urge the Court not to adopt the approach now urged by the Government. The *Official-Southern* case is a highly important case to the economy of the South. As this Court itself recognized in *New York* v. *United States*, 331 U.S. 284, 315 (1947), the South was, for many decades, the victim of a discriminatory freight rate structure which retarded its development. We believe that the effect of the Commission's decision in the *Official-Southern* Divisions case is to re-impose that discrimination in another form by placing the Southern railroads at a disadvantage on interterritorial traffic because of asserted cost relationships that have no real connection to that traffic at all. Of course, we do not expect this Court now to decide the

merits of our attack upon the *Official-Southern* order. But we urge the Court not to make a decision in these cases which may effectively deny us our right to a day in court on issues of such vast importance to the people of the South.

CONCLUSION

For the foregoing reasons, the Court should not pass upon the cost issues reserved by the district court. The Court should either affirm the judgment of the district court, or, if it reverses that judgment, it should remand the cases to the district court for resolution of the cost issues.

Respectfully submitted,

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April 5, 1967

APPENDIX A

ISSUES PRESENTED BY THE SOUTHERN RAILROADS AND THE SOUTHERN GOVERNORS' CONFERENCE AND SOUTHEASTERN ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS IN THE COURT ACTION TO SET ASIDE THE COMMISSION'S ORDER IN THE OFFICIAL-SOUTHERN DIVISIONS CASE.

The issues of law as stated by plaintiffs and intervening plaintiffs are as follows:

(1) Whether the Commission violated the requirements of Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)) by imposing upon the Southern railroads the burden of proof with respect to the costs of handling the particular traffic involved in this case, where the Northern railroads were the complainants in the proceedings before the Commission, and where the Northern railroads sought an inflation in their divisions which would accord them greater compensation than the Southern railroads for the same amount and kind of rail service?

(2) Whether, regardless of the proper allocation of the burden of proof in the proceedings before the Commission, the Northern railroads failed to comply with a legal obligation to come forward with data in their sole possession showing their costs of handling the particular traffic involved in this case?

(3) Whether the Commission has power under Sections 12(1) and 20(1) of the Interstate Commerce Act (49 U.S.C. §§ 12(1), 20(1)) to compel parties before it to produce evidence in their sole possession necessary to resolve issues affected with the public interest, and, if so, whether the Commission's failure to assure the making

of a complete record of the costs of handling the traffic involved in this case requires that its orders be set aside?

(4) Whether the Commission violated Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) in adopting its examiners' approach to the issues of burden of proof, duty to come forward and responsibility for an adequate record, without making either rulings upon, or findings with respect to, the Southern railroads' specific exceptions to that approach?

(5) Whether the admitted participation of the Commission's Cost Section in its decision-making process deprived the Southern railroads and the Southern interveners of the full and fair hearing to which they were entitled under the Interstate Commerce Act (49 U.S.C. §1, *et seq.*), the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*), and Amendment V of the Federal Constitution?

(6) Whether the action of the Commission in this case rests upon an unlawful conception of the rule that there must be evidence typical in character and ample in quantity with respect to the divisions and services performed under the particular rates being divided?

(7) Whether the Commission violated Section 7(d) of the Administrative Procedure Act (5 U.S.C. § 1006(d)) by relying upon evidence and data outside the record in the resolution of material issues before it?

(8) (a) Whether the Commission violated Section 7 (c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)), wrongfully sanctioned a failure on the part of the party in possession of evidence to come forward with it, or improperly ignored its own obligation to assure an adequate record when it rejected the Southern railroads' adjustment of territorial average costs to exclude suburban passenger deficits on the ground that the adjustment did not take into account the fact that a part of these deficits

is related to freight service, where neither the Northern railroads nor the Commission put the data in the record which is necessary to disclose the existence of extent of this relationship?

(b) Whether the Commission acted arbitrarily and without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 1009 (e)) when it included all of the Northern railroads' suburban passenger deficits in the freight costs used to determine their costs of handling Official-Southern traffic, where the evidence showed, and the Commission expressly recognized, that some of the suburban passenger deficits had nothing whatever to do with freight operations?

(c) Whether the treatment accorded suburban passenger deficits by the Commission is inconsistent in principle with the previously recognized principle that such deficits constitute a problem which should be treated separately so as not to impose a burden upon freight service, and, if so whether the Commission's failure to make reasoned findings explaining its departure from this previously established principle violates Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b))?

(9) Whether the Commission acted arbitrarily and without support of substantial evidence within the meaning of Section 10(c) of the Administrative Procedure Act (5 U.S.C. § 1009(e)) when it ascribed 58% higher costs to the Northern railroads for interchanging freight cars at the territorial gateways?

(10) (a) Whether the Commission acted arbitrarily and without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 1009(e)) when it used territorial average car costs as the measure of the cost of the cars

handling Official Southern traffic, even though this traffic is carried in the same cars in both territories?.

(b) Whether the Commission violated Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)) because the reasons given by the Commission to support its use of territorial average car cost figures are irrational and wholly insufficient to support such figures?

(c) Whether the Commission violated Section 15(6) of the Interstate Commerce Act (49 U.S.C. §15(6)) in prescribing inflated divisions for the Northern railroads based partly upon higher average car costs in the North where these higher average car costs are the product, in part at least, of differences in rentals paid by the two groups of railroads for cars used by them but owned by other railroads, rather than any cost incurred in the service of transportation?

(11) (a) Whether the Commission violated Section 7(c), of the Administrative Procedure Act (5 U.S.C. § 1006(c)), wrongfully sanctioned a failure on the part of the party in possession of evidence to come forward with it, or improperly ignored its own obligation to assure an adequate record when it rejected the Southern railroads' adjustment of territorial average switching costs (based upon an actual study of switching operations in the South) on the ground that no comparable study had been made in the North?

(b) Whether the Commission violated Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) in simply reciting contentions of the parties with respect to switching costs without findings as to the soundness of the contentions recited, and in adopting practically verbatim the report of its examiners on this issue without making rulings upon, or findings with respect to, the Southern railroads' exceptions on the issue?

(12) (a) Whether the Commission violated Section 7(c) of the Administrative Procedure Act (5 U.S.C.

§ 1006(c)), wrongfully sanctioned a failure on the part of the party in possession of evidence to come forward with it, or improperly ignored its own obligation to assure an adequate record when it rejected the Southern railroads' adjustment of territorial average empty return ratios on the ground that this adjustment was based upon inadequate evidence with respect to the empty return ratios of the Northern railroads in handling the traffic at issue?

(b) Whether the Commission acted arbitrarily and without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 1009(e)) when it used territorial average empty return ratios as a measure of the empty return experience of both groups of railroads on Official-Southern traffic, even though empty return ratios of freight cars are substantially affected by the kind of freight carried and there are substantial differences in the composition of the average traffic in the respective territories that have nothing to do with Official-Southern traffic at issue in this case?

(13) (a) Whether the Commission violated Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)), wrongfully sanctioned a failure on the part of the party in possession of evidence to come forward with it, or improperly ignored its own obligation to assure an adequate record when it rejected the Southern railroads' adjustment of territorial average costs to remove inconsistencies in the count of cars interchanged by the two groups of railroads on the ground the evidence of record was not adequate with respect to the Northern railroads' operations to permit a correct computation of the adjustment?

(b) Whether the Commission acted arbitrarily and without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Pro-

cedure Act (5 U.S.C. § 1009 (e)) when it used the count of cars interchanged as reported and included in the territorial averages, even though the evidence showed that this count overstated the costs of the Northern railroads relative to those of the Southern railroads?

(14) Whether the Commission violated Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)) wrongfully sanctioned a failure on the part of the party in possession of evidence to come forward with it, or improperly ignored its own obligation to assure an adequate record when it rejected the Southern railroads' adjustment of the territorial average constant cost of transit commodities in the South on the ground that evidence was not available by which it could be determined whether a comparable adjustment should be made in the territorial average of the North?

(15) Whether, even assuming that the Commission's specific cost findings are accepted, the Commission violated Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) by failing to make reasoned findings to support the conclusion which it stated that the higher costs found to have been experienced by the Northern railroads in the handling of Official-Southern traffic reflected inherent disadvantages in transportation conditions in the North?

(16) Whether there is substantial evidence in the record within the meaning of Section 10 (e) of the Administrative Procedure Act (5 U.S.C. § 1009(e)) to support the view taken by the Commission that the higher Northern costs found must reflect inherent territorial disadvantages, as compared to the South, because all other things which might explain the cost differences on other grounds are equal in the two territories?

(17) Whether the Commission satisfied the requirement of Section 15(6) of the Interstate Commerce Act

(49 U.S.C. § 15(6)) that it give due consideration to the matter of relative efficiency in prescribing divisions of joint freight rates where the Commission found the Northern railroads experienced higher costs for several aspects of the handling of Official-Southern freight traffic but made no findings as to why it was necessary that the Northern railroads incur higher costs in handling the Official-Southern traffic at issue?

(18) (a) Whether the Commission violated the requirement of Section 15(6) of the Interstate Commerce Act (49 U.S.C. § 15(6)) that it give due consideration to the matter of relative needs in prescribing divisions of joint freight rates when it prescribed a basis of divisions which would diminish the revenues of the Southern railroads by an amount substantially greater than found in its reports?

(b) Whether, regardless of the amount of the revenue loss imposed upon the Southern railroads, the Commission violated Section 15(6) of the Interstate Commerce Act (49 U.S.C. § 15(6)) by increasing the revenues of the Northern railroads through an inflation in their divisions without any finding that the revenue needs of those railroads were greater than those of the Southern railroads?

(19) Whether the Commission violated Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) in prescribing an inflation in the divisions of the Northern railroads ostensibly to offset inherent territorial disadvantages in transportation conditions in the North, without: (a) making any ruling at all upon the Southern interveners' exception which objected to any imposition of the burden of the Northern transportation problems upon the South without specific findings that the Southern economy could sustain such burdens and that the North could not sustain its own burdens; (b) making any find-

ing to explain the need for, or effect of, the Northern inflation in terms of the economic conditions in the two territories; or, (c) offering any explanation at all for the abandonment of the previously established principle of primary local responsibility under which divisions had consistently been maintained at a uniform level except to the extent that rate levels were found to be higher in one territory or another?

(20) Whether there is substantial evidence in the record within the meaning of Section 10(c) of the Administrative Procedure Act (5 U.S.C. § 1009(e)) to support the conclusion implicit in the Commission's action that the Southern economy can better afford to provide the means for meeting Northern transportation problems than the North's own economy?

(21) Whether the Commission's issuance, on its own motion, of a supplemental report in which it undertook to answer issues raised in the complaint in this action, constitutes a denial of due process within the meaning of Amendment V to the Federal Constitution, either in that such supplemental report was issued without notice to plaintiffs and intervening plaintiffs, or in that such action failed to observe a separation between the judicial and executive functions of the Commission?

(22) Whether the procedure adopted by the Commission in this proceeding by which its Cost Section was permitted to participate, not as a party representing the public, but as a decision-maker, and by which the Commission itself became an advocate defending its order against attack so far departed from the accepted course of administrative proceedings that the Southern railroads and the Southern interveners were denied the full and fair hearing to which they were entitled under the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*), the Administrative Procedure Act (5 U.S.C. § 1001 *et seq.*) and Amendment V of the Federal Constitution?

(23) Whether, if the Court holds that the Commission's action prescribing an inflation in the divisions of Northern railroads is illegal for any of the reasons urged by the plaintiffs or intervening plaintiffs, the judgment of this Court should set aside only that part of the Commission's order which illegally prescribes an inflation in the Northern railroads' divisions and thus leave undisturbed that portion of the Commission's order correcting the relationship as between long-haul and short-haul carriers?